FOR ARGUMENT

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Nos. 94-631, 94-797 and 94-929

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ZELL MILLER, *et al.*,

Appellants

v.

DAVIDA JOHNSON, *et al.*,

Appellees

LUCIOUS ABRAMS, JR., *et al.*,

Appellants

v.

DAVIDA JOHNSON, *et al.*,

Appellees

UNITED STATES OF AMERICA,

Appellant

v.

DAVIDA JOHNSON, *et al.*,

Appellees

On Appeal from the United States District Court Southern District of Georgia (Three Judge Court)

BRIEF OF THE APPELLEES

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QUESTIONS PRESENTED

1. Whether Appellants have carried their burden of proving the District Court's determination that the Eleventh District is the product of racial gerrymandering is clearly erroneous?
2. Whether the legislation creating the Eleventh District is subject to strict scrutiny?
3. Whether the State abandoned any constitutional defense of the District by its failure to articulate any compelling state interest furthered by the intentional use of racial classifications in its creation?
4. Whether Intervenors may advance compelling state interests to purportedly justify racial gerrymandering where the State expressly denies it was so motivated?
5. Assuming the Court accepts one of the proffered rationalizations for the gerrymandering as a compelling state interest, whether the District Court correctly determined the Eleventh District can not survive strict scrutiny?

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BRIEF OF THE APPELLEES

STATEMENT OF THE CASE

This case presents the question whether the extreme racial gerrymandering embodied in the legislation establishing Georgia's Eleventh Congressional District violates the Equal Protection Clause of the Constitution. Applying this Court's decison in *Shaw v. Reno,* 113 S.Ct. 2816 (1993), the District Court found such a violation since race was the overriding consideration in the District's bizarre configuration and since the legislation creating these lines (O.C.G.A. § 21-2-3) was not narrowly tailored to further a compelling governmental interest.

Without acknowledging the standard of review applicable to the District Court's findings of fact, Appellants assail the decision from a variety of angles. The "State Defendants" (Defendants Miller, Howard and Cleland), concede the district was racially gerrymandered as defined in *Shaw, supra* at 2823 ("the deliberate and arbitrary distortion of distinct boundaries . . . for [racial] purposes"), but assert that the District's appearance is not sufficiently irregular or bizarre to come within the reach of *Shaw.*[1] The Appellant United States, acting through the Department of Justice ("DOJ") goes so far as to assert that "the appearance of the Eleventh District on a map comports reasonably with Georgia's ordinary districting practices." DOJ Brief, p. 23. Appellants collectively downplay race as but one of several considerations

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[1] One of the Defendants at trial, Speaker of Georgia's House of Representatives, the Hon. Thomas Murphy, reluctantly cast the tie-breaking vote in favor of the final Georgia plan. He stated at the time the State was engaging in racial gerrymandering because "what we did is went into counties and precincts and picked up pockets of African-Americans to make a strong district with voting age black population so that it would guarantee a black would be elected from there." Tr. II, 62. He characterized the District as resembling an "octopus." Tr. II, 63. Speaker Murphy did not appeal the decision of the District Court.

which affected the boundaries of the District, thus precluding relief.

These portrayals are, at best, advocacy. The lines of Georgia's Eleventh District are extraordinarily irregular by any honest reckoning. They are absolutely without precedent in the history of Georgia congressional redistricting. To contend that race did not drive the decision-making concerning the lines of the Eleventh District is to deny reality. Georgia's entire congressional districting scheme could not be more racialized than it is today. It is the epitome of what this Court decried in *Shaw*.

If one fact pervades this case, it is the fact that the 1992 redistricting plan does not remotely resemble what the Georgia legislature wanted. Georgia is subject to the preclearance requirements of Section 5 of the Voting Rights Act. Once Georgia chose not to seek a judicial stamp of approval for its redistricting—an extraordinarily difficult undertaking in March of an election year—its only option was to follow the mandate of the DOJ. If it refused, a federal court in Atlanta had already scheduled a hearing to draw the lines for the State by default. *See* note 22, *infra*.

The evidence presented at trial established beyond any doubt that the DOJ approached redistricting in Georgia with a specific mission. That mission was to maximize by whatever means necessary both the number of majority black congressional districts in the State and the percentage of black voting age population within these districts. The fact that the State's African-American population, other than in Atlanta, is widely and unevenly disbursed throughout the State south of Atlanta mattered not to the DOJ.[2] J.A. 130. The command was that blacks

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[2] Only 17 out of 159 counties in Georgia are majority black. They are largely rural and sparsely populated, representing only 7.2 percent of the State's total black population, according to the 1990 census. Over a third of these people reside in Dougherty County, in Southwest Georgia, where Albany is the county seat. Pl. Ex. 16A, at 123-24.

needed to be linked together with other blacks regardless of location, regardless of economics, regardless of voter confusion, regardless of literally anaything other than the constitutional requirement of one person one vote.[3]

Georgia's 1992 Redistricting Plan Creates Lines Which Are Exceedingly Irregular

Appellants go to significant lengths to make the Eleventh District appear somehow normal.[4] Staring Appellants in the face, however, are the lines themselves. The most cursory inspection by someone knowledgeable about Georgia's geography would reveal their extremely irregular character.

What defines the Eleventh District, both racially and geographically, is not its very sparsely populated center, but the serpentine appendages which dramatically spring from that center. One snakes along the Savannah River to select portions of the City of Savannah. Another hooks in a thoroughly confusing fashion through Richmond County and City of Augusta. Yet another runs like a thread through Henry County, where the District almost disappears, only to be reborn in select portions of DeKalb County adjacent to the City of Atlanta. Additional, odd

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[3] Even the one-person one-vote requirement was partially sacrificed at the alter of racial classification. In order to satisfy the DOJ's vision for the State, it was necessary to create an unsually high overall population deviation (.94). See O'Rourke Report, Pl. Ex. 85, at 2-3.

[4] It is apparent from media reports that the District is widely perceived as anything but "normal." An editorial in the Atlanta Journal describes the District as "grotesque." A Wall Street Journal editorial has described the District as "bizarrely shaped." The Augusta Chronicle has described it as a "crazy quilt." Along with congressional districts in North Carolina and Louisiana, it was featured in the July 12, 1993 issue of *Time* Magazine, and the lead story in the February 14, 1994 edition of the *New York Times*. Pl. Ex. 19-23. J.A. at 29 (Stip. 74). A widely-quoted reference source on congressional districts, the Almanac of American Politics 1994, refers to the District as a "geographic monstrosity." Tr. III, 105.

appendages are found in Wilkes, Baldwin and Twiggs Counties.[5]

The Eleventh District is not only shocking on this "macro" level. The fact that the District traverses almost the entire State at its widest part is only the beginning. In many locations, the lines are very difficult if not impossible to follow, even with a road map. Dr. Timothy O'Rourke, an expert retained by Plaintiffs, personally tracked the district lines in several areas. In Augusta, he testified the lines "will follow a major cross-town road for a couple of blocks and it will then veer into residential neighborhoods. It is a very difficult line to find. It certainly is not a line that is easily demarcated on a map. . ." Tr. III, 106. Overall, he found the lines were "not readily identifiable so that if you are a citizen and its not really clear to you—one could not easily explain to you if you were in the vicinity of a line whether you were in the district or out." Tr. III, 110. *See* Detail Map, O'Rourke Supp. Rpt., Pl. Ex. 85, at 3.

In Chatham County and the City of Savannah, Dr. O'Rourke observed similarly strange line configurations.

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[5] The use of appendages in Georgia's 1992 congressional redistricting legislation to create artificial districts driven by race is by no means restricted to the Eleventh District. The Second District also has numerous appendages along its borders, which methodically divide counties and cities in tortuous fashion. One protrusion meanders through Houston, Peach and Bibb Counties in a manner which resembles a tomato splat. J.A. 187-188. At its northern end, the Eighth District loops around the Second to take in the western portion of Bibb County. J.A. 62. The resulting configuration of the Second, Third, Eighth and Eleventh Congressional Districts in this area prompted Linda Meggers, Reapportionment Services Director for the Georgia General Assembly for more than twenty years, to observe: "It gets very hard to understand right there." Tr. I, 79. The Second Congressional District also includes portions of Meriwether County, taken in by means of a tiny pathway, which leaves that county divided into three segments, two of which are non-contiguous, but nevertheless included in the same congressional district. Defendant Lt. Governor Howard characterized what happened to Meriwether County as a "terrible thing—it was just emasculated in this process." Tr. IV, 218.

At the north end of the county, he found a "very, very narrow [land] bridge indeed" that was "not readilly accessible by roads on the maps" since it was swamp land within the Savannah Wildlife Refuge. Tr. III, 113-15. At one point inside the City of Savannah, the entire width of the district was between 2/10 and 3/10 of a mile. Tr. III, 113.

Extensive evidence was provided at trial to support Dr. O'Rourke's conclusion that "a tour of the Eleventh District confirmed what the maps of the district only begin to suggest: that the lines of the district are, in many places, jagged and haphazard, difficult to follow, barely contiguous and plainly noncognizable." Pl. Ex. 85, at 8-9 (Detail Maps).[6]

The grossly irregular lines of the Eleventh and Second Districts create very strange features in the Third and Eighth Congressional Districts as well. The Third District is "hollowed out" by virtue of the intrusion of the Second into Meriwether County. The Eighth District has an almost indecipherable western edge, directly caused by numerous gossamer appendages from the Second. Absent a large detail map, the Eighth District appears to be completely dissected in Bibb County. J.A. 62.

While the lines of the Eleventh District are extraordinary in absolute terms, they are even more so when viewed in light of where the population of the district is located. The portion of DeKalb County in the Eleventh District alone constitutes 35.3% of the district's total population. The excised portions of DeKalb, Richmond, Chatham and Baldwin Counties account for nearly 70% of the district's population. Pl. Ex. 24.

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[6] The difficulty in ascertaining where the lines of the district are located has prompted the office of the present U.S. Representative for the Eleventh District to contact Georgia's Legislative Reapportionment Office for more detailed maps. The reason that staffers provided for the inquiry was "we can't figure out what's ours." These requests have continued even after the representative had been in office for almost two years. Tr. II, 34.

Of the 18 "other" counties (or parts thereof included in the Eleventh Congressional District), not one has a population constituting more than 3.5% of the entire district. Indeed, 12 have a population constituting 2% or less of the district's total. The portion of DeKalb County included in the Eleventh District *by itself* represents 4.1% more of the district's total population than all of these 18 counties put together. J.A. 131.

Race Was The Overriding Consideration In Georgia's 1992 Congressional Redistricting Plan

By placing demographic information over the lines established in Georgia's 1992 Congressional Redistricting Plan, it is immediately apparent that race dominated the 1992 Georgia Congresional Redistricting Plan in general, and the Eleventh and Second Congressional Districts in particular. Indeed, it is quite apparent that the Eleventh District is not a district at all in the conventional sense. It is nothing but an amalgam of distantly located concentrations of black population located at the end of racially gerrymandered appendages attached to a thinly populated rural center. By means of these computer generated racially gerrymandered appendages, the district is transformed into one which is almost 65% black.

The demographic heart of the population of the Eleventh District is split amongst portions of three distant counties, DeKalb, Richmond and Chatham. They account for almost two-thirds of the total population and more than 73.7% of the black population of the entire district. J.A. 131. No one can seriously deny that these areas were brought into the Eleventh District for purely racial reasons, and that the "land bridges" used to reach them exist to avoid including more whites in the district.

The statistics respecting these three counties are simply overwhelming. DeKalb County as a whole is 42.2% black. Yet, on the Eleventh District side of the line, 74.6% of the population is black. On the other side of the line in DeKalb County, only 22.4% of the population is black. In Richmond County, blacks constitute 42%

of the county's population. Yet, blacks constitute 66% of the county's population within the district. Blacks constitute only 18.8% of the non-Eleventh portion of Richmond. In Chatham County, blacks constitute 38.1% of the population. Yet, in the portion of the county within the Eleventh, blacks constitute 84.1% of the population. On the other side of the line, they constitute only 15% of the population. Pl. Ex. 16, Table 3.

The same phenomenon of dividing citizens by race exists in the three other non-land bridge split counties as well.[7] Pl. Ex. 16, Table 5. In Twiggs County, 88.8% of the County's blacks are placed in the Eleventh. In Wilkes, the figure is 62%, and in Baldwin 89.5%. No one can seriously argue that such stark divisions are anything other than an intentional segregation of voters according to race.

In the face of this uncontroverted statistical evidence, the State Defendants in particular come forward with their own explanation for all the split counties, cities and precincts in the Eleventh District, somehow trying to show "non-racial considerations" in the dissection of these political subdivisions. While they criticize the Distrct Court for not commentng on every last squiggle, they surely

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[7] The two split counties which are exclusively land bridges are Henry and Effingham.

It was "necessary" to utilize a land bridge in Henry because it has a substantial population, which is 90% white. It can readily be seen that the Henry County corridor alone does not link the black population excised from DeKalb County to other population changes in the district by itself. The remainder of the linkage is provided by lining up three additional counties (Butts, Jasper and Putnam) in "single file" to reach the district's "geographic center." While these counties remained whole, they are very sparsely populated, collectively accounting for only 3.5% of the district's total population. Because they have no significant impact on the District's racial percentages, it was acceptable to leave them whole.

It is admitted by the State that an Effingham County land bridge exists solely to link black population in Savannah with the rest of the District. See State Admissions of Fact, Tr. IV, 159-60. Effingham County is 85% white.

realize that their efforts are an exercise in accentuating trivialities. Indeed, some of the most compelling evidence *contradicting* the State Defendants' current argument came from the Defendant Lt. Gov. Howard. When asked what portions of the boundaries of the Eleventh he considered to be a function of race, Howard responded "Well, basically *the whole district.*" Tr. IV, 208. (Emphasis added). According to him, the district lines were drawn "for the purpose of achieving a certain racial—a certain racial composition of the district. I think that's obvious. I don't think anybody disagrees with that." *Id.* When advised "Well, they [the Appellants] do", he responded: "We're trying to achieve a certain VAP in a certain population. Why else would you draw it like that?" *Id.*

Howard acknowledged that DeKalb County was an integral part of this effort. He noted that some black voters in DeKalb were "ceded" to the majority-minority Fifth District because of their history of low voter turnout. "They [the DOJ] wanted us to go in and get all the blacks that had the best voting records into this [Eleventh] district. . ." Tr. IV, 209-210. He further testified that the slice of Henry County that ended up in the Eleventh was a "bridge" designed to connect "the large block of black voters in DeKalb County and the large block of black voters elsewhere." Tr. IV, 211. Other locations for this land bridge, such as portions of Newton and Rockdale Counties, were considered as alternatives to Henry since they too "don't have any significant number of black voters." Tr. IV, 211. Regardless of the specific route chosen, the State Defendants admitted the sole purpose of the land bridge was to avoid white population in the search for black voters.

The Lt. Governor also acknowledged that the irregular lines in Twiggs County were the product of "computerized hunting for concentrations of blacks." Tr. IV, 213. One portion of the county was "becoming more white so we left that out." *Id.* As for Baldwin County, he recalled the understandable bitter opposition to splitting the county. "But the Justice Department told us that we had to go

in and get the blacks in Baldwin County . . . and include that in the Eleventh District. So we did that." Tr. IV, 312. Wilkes County followed the same pattern; the Lt. Governor explained its dissection as follows: "The areas that we have included in the Eleventh District in Wilkes County were more heavily black than the northern part of it. So we went in and just got as many black voters as we could on the southern edge, so that's why the line sort of meanders around through there." Tr. IV, 212. The land bridge in Effingham County "was done to minimize the effects on Effingham County, but at the same time build a bridge to Savannah to get the black voters in Savannah as we were directed to do." Tr. IV, 214.[8]

Aside from this and other compelling testimony, the State Defendants' effort is premised on a logical flaw. Simply because a district line follows a portion of a precinct line or a municipal boundary line or partially coincides with a major thoroughfare does not begin to suggest that its placement was not race-based. Racial percentages of precincts are well known when they are included in a district. Tr. II, 271-82. It was the ACLU's

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[8] While the Lt. Governor did not testify extensively about the district lines in Savannah and Augusta, other witnesses did. Augusta was slashed to pieces solely to achieve desired racial percentages. Tr. I, 93. It was a "block by block" racial search. P.I. Tr. 51. So many voting precincts were split that some 32 new ones had to be created. Tr. II, 224. The land bridge to reach Augusta is a strip of nearly deserted territory. The State took its cue from the ACLU's Max Black plan. The reason for the difference between it and the final plan was explained by Ms. Meggers: "[I]t [the Max Black Plan] only drew the three [black majority] districts. I had to draw all eleven of them." Tr. I, 102.

As for Savannah, Mr. Dixon, who drew the lines, made clear that his motives were purely race-based. "Frankly, taking the directive from the Justice Department, [I was] quite literally identifying the concentrations of the black urban concentrations in the City of Savannah and somehow getting to them and incorporating them in contigiuty [with] the Eleventh District. P.I. Tr., 52. He drew the lines "to make sure that blacks were on one side and the whites were on the other." *Id.* When asked if there was any consideration besides race in this effort, he testified there were "none whatsoever." Tr. IV, 159-60.

Kathleen Wilde, the primary architect of the "Max Black" plan, who characterized precincts as the "traditional building blocks" of districting. Tr. IV, 83. The legislative guidelines say the same thing. J.A. 68-69, 75. It is likewise an unassailable fact that, in some urban areas, black population tends to be concentrated on one side of a major thoroughfare or rail line. Tr. IV, 80. This is the case both in parts of DeKalb County and in parts of the City of Savannah. Tr. II, 216. And the computer software provided racial data in census blocks that often coincided with these types of "lines." This was the lowest level at which the computer could access racial information, which aside from VAP and total population, was the only demographic information maintained in the system. Tr. I, 50-51; Tr. II, 14.

In light of the way this district's lines corral black voters and exclude whites, as borne out by the statistics concerning the racial impact of those lines on Georgia's congressional districts, further discussion of the massive *direct* evidence of racial gerrymandering would appear almost superfluous. As the District Court stated: "At a glance, the appendages of the Eleventh are obviously designed to do something; after cursory exploration, it rapidly becomes clear that the 'something' is maximization of black voting strength." J.S. App. 49. Suffice it to say that, without exception, every witness who testified in the case concerning the redistricting process confirmed that the 1992 congressional redistricting plan was a deliberate effort to separate voters according to their race. *See* Murphy, Tr. II, 62; Meggers, Tr. I, 101-02-106-07; 125-25, 270-273; Dixon, P.I. Tr. 41-42, 46-49, 51-52; Hanner, Tr. III, 247-259; Garner, Tr. III, 210-214. While Appellants do their level best to downplay the evidence presented at trial, they cannot honestly disagree with the Court's conclusion that "copious amounts of direct evidence" was presented to establish that the dramatically irregular lines of the Eleventh Congressional District were the product of race-based manipulation. J.S. App. 52.

Georgia's 1992 Redistricting Plan Makes A Mockery Of Traditional Districting Principles

Shaw makes clear that traditional districting principles, such as compactness, contiguity and respect for political subdivisions are not constitutionally required. Nevertheless, they take on considerable significance in the context of ascertaining whether racial gerrymandering has occurred. This is because they are "objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw, supra* at 2827.

Appellants attempt to sidestep this aspect of *Shaw* by suggesting that a core traditional districting principle like compactness has "relative unimportance" in Georgia. State Brief, at 20; DOJ Brief, at 24-25. Such a contention is simply untrue. While it is correct that the guidelines of the House and Senate Reapportionment Committees do not expressly use the word "compactness", both sets of guidelines plainly state that, where legal requirements are satisfied, "efforts may be made to maintain the integrity of political subdivisions and the cores of existing districts." J.A. 68, 75. Contrary to Appellants' suggestion, Georgia has a long history of reasonably compact districts, with common economic interests being the "prime driving force behind congressional redistricting traditionally." Tr. I, 21-22. Linda Meggers, among others, recounted the specialized interests traditionally lying at the heart of the First (coastal) District, the Second (specialized agricultural) District, the Third (military) District, and the Seventh (textile and carpeting) District. Tr. I, 23-27. The Eighth District, notwithstanding its relatively large size, was "definitely agricultural from one end to the other." Tr. I, 14. It was undisputed that its northward expansion was only undertaken to comply with one-person one-vote. Tr. I, 31-34. The Ninth District is the State's mountain district where poultry is the predominant industry.[9] Tr. I, 23-27. The

[9] The Abrams Intervenors argue that the Ninth District was drawn to be a distinctive white community. This is incorrect. The

Tenth has traditionally encompassed the Athens-Augusta area and the surrounding rural areas of East Central Georgia. Tr. I, 25. *See* also P.I. Tr. 59-63; Tr. III, 251.

Georgia's prior congressional maps confirm the significance of compactness in congressional redistricting. A review of the maps from 1964, 1971, and 1982 invariably reflect reasonably compact districts. J.A. 78-81. By way of contrast, they also amply demonstrate the unprecedented departure the 1992 redistricting plan made from those practices.

That the State Defendants would now challenge the significance of compactness in Georgia congressional redistricting is a remarkable turn of events. During the preclearance process, Georgia's Attorney General was literally pleading with the DOJ not to require what ultimately was required. In his letter of March 3, 1992, he wrote: "In addition, the extension of the Second District into Bibb County and the corresponding extension of the Eleventh District into Chatham County, with all of the necessary attendant changes, *violate all reasonable standards of compactness and contiguity*." J.A. 118. (Emphasis added.) How could something which was so critical then become marginal now?

As the District Court found, the Eleventh District is not compact by any credible definition of the term.[10] J.S.

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mountain region of the State is not race-based. The region is geographically distinct. (In contrast, the Eleventh traverses four regions of the State. Pl. Ex. 43.). There are no adjacent black population concentrations that were excluded. No evidence was offered at trial to suggest that racial gerrymandering had anything to do with the configuration of the Ninth District. In a state 73% white, there will be predominantly white districts, particularly when 61.7% of its black citizens are packed into three majority-minority districts.

[10] Even the Attorney General testified that the Eleventh District is not compact. P.I. Tr. 148. The only witness at trial to offer a contrary opinion was an expert retained by the State Defendants. She offered a "meanderingness" test developed by the State Defendants' attorneys especially for this litgation. None of the

App. 80. The massive amount of evidence presented at trial on this subject confirms what any reasonable individual would conclude given even a nodding acquaintance with the geography of the State and its redistricting history.[11] The sole reason for this lack of compactness is that "reasonable standards of compactness and contiguity" were of no interest to the DOJ. All that mattered was the lumping together of distantly located urban and suburban blacks by means of a sprawling, and often tortuous, rural pathway.[12]

Appellants refer to it in the briefs, and for good reason. The District Court found it "especially useless in analyzing the Eleventh District" since its measures only "the vast—and sparsely populated" core of the District while the "narrow—and densely populated—appendages escape notice." J.S. App. 79. Far from aiding Appellants, the test is "an excellent means of highlighting the egregiously manipulated portions of any voting district." *Id.*

Not surprisingly, using mathematical measurements of compactness the Eleventh District scores the lowest in Georgia, and among the lowest nationwide (bottom 8% in "dispersion score"; bottom 11% in "perimeter score"). Pl. Ex. 85, 7.

[11] The State Defendants offered into evidence maps of certain Georgia cities for the ostensible purpose of showing that "geometric niceness" is relatively unimportant in drawing municipal boundaries. These maps are irrelevant to whether compactness is a traditional districting principle in congressional redistricting. At the Pretrial Conference, the District Court advised the parties that municipal boundaries are accretions of annexations which are tax-driven and that the Court had little interest in them. At trial, the Court again advised the State these maps were without evidentiary value. Tr. V, 120-21, 123. And the State offered no evidence as to how they were relevant.

[12] At pp. 23-24 of its Brief, the DOJ states the Eleventh District "generally occupies an area similar in shape to, but generally south of, the former Tenth District, which also spans a central part of the State from Augusta to the Atlanta suburbs." What the DOJ bases this statement on is unknown. It is clearly wrong. A cursory review of prior redistricting maps shows that the "old Tenth" does not resemble the Eleventh District in any way, shape or form. The old Tenth had no hooks, tails or other wild protrusions nor did it ever extend, in the words of Ms. Meggers, "literally from the shadow of the Capital to Tybee [Lighthouse in Savannah]." Indeed,

Appellants had to acknowledge that "respect for political subdivisions" is an important and traditional redistricting principle in Georgia. They are thus forced to contend that political subdivisions *were* respected in 1992. In fact, nothing could be further from the truth.

The essence of the State Defendants' argument is that "86.6% of the entire area of the Eleventh Congressional District is comprised of whole counties" and that "71.1% of the Eleventh Congressional District lines runs right along boundaries of the State, counties or municipalities." [13] These numbers, however, do not mean political subdivisions have been respected. All that these numbers demonstrate is that county boundaries have been followed only where relatively few people are located and where there is no material impact on the racial composition of the district. Once again, the statistics tell the story in dramatic fashion.

As shown in Plaintiffs' Table 2 (Pl. Ex. 24), the portions of DeKalb, Richmond and Chatham Counties located in the Eleventh District *represent less than 3.5% of the land area included in the district.* Yet, almost two-thirds of the population of the district and almost three-quarters of the black population of the district resides in these three relatively small areas, all at the extreme ends of appendages. J.A. 131.

When the analysis is extended to include all eight split counties, it can be seen that *political subdivisions have been "respected" where less than 27% of the district's citizens reside. Id.* Where the vast majority of people live, political subdivisions have not been respected at all.

The degree to which political subdivisions have *not* been respected in the 1992 congressional redistricting plan

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it never extended further southeast than Richmond County and the City of Augusta.

[13] The State Defendants' utilization of State boundaries to "up" its percentages is curious indeed. The State has little choice but to draw congressional districts within them.

is without precedent in Georgia history. Between 1931 and 1964, Georgia's congressional districts had no split counties. J.A. 81. In 1964, only Fulton County was split—in order to comply with one person one vote. J.A. 78. In 1971, two counties were split, Fulton and Whitfield.[14] J.A. 79. In 1982, only three (of 159) counties were split—the metro Atlanta counties of Fulton, DeKalb and Gwinnett. J.A. 80.

The 1992 congressional redistricting plan splits 26 counties. Pl. Ex. 16A. This represents a 1200% increase over the 1971 plan and a 767% increase over the 1982 plan. In the Eleventh District alone, *almost three times* as many counties are split than were split in the *entire* 1982 congressional redistricting plan. Of the 26 split counties in the current congressional redistricting plan, 20 of them occur in the Eleventh and Second Districts. These numbers are stunning in light of the heavy emphasis citizens placed on *not* splitting counties at public hearings on redistricting held throughout the State in 1991. Tr. III, 207, 246; P.I. Tr. 43.

The 1992 congressional redistricting plan is no less sparing of municipalities. J.A. 128. Prior to 1964, there were no split municipalities. In 1971 there were two, Atlanta and Dalton (Whitfield County). In 1982, five metro Atlanta cities were split. However, the 1992 plan splits 31 municipalities, an increase of 520% over the previous decade.

The evidence at trial was uncontradicted that the ACLU's "Max Black" plan served as the minority population benchmark throughout. Including whole, albeit sparsely populated, counties did not alter the racial composition of the district in any significant way because Ms. Meggers intensified the racial gerrymander where it counted—in the densely populated, but distantly located, black urban centers. As she testified: "I was trying to

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[14] The splitting of Whitfield County was due to political considerations. The legislature took a "big beating" for having done so. Tr. I, 35. The split was removed in the next round of redistricting.

clean the plan up, get back the whole counties as much as I could, and at the same time achieve this benchmark number that had been presented to us in the Max Black plan." Tr. I, 96-97. The lines Ms. Meggers drew in urban areas became even more irregular than the ACLU lines and necessitated splitting more precincts. Tr. I, 98-99; Tr. IV, 84. "[W]hat I did was basically go in and find white areas to take out to offset the whites I may have added in the rural counties." Tr. II, 30; Tr. I, 102, 224. By creating more jagged and irregular lines in population centers, including splitting precincts, Ms. Meggers got the plan "within just fractions of a percentage of what they achieved" in the Max Black congressional plan. Tr. II, 55.

As the foregoing makes clear, the State Defendants' assertions regarding "respect for political subdivisions" is a charade. Essentially they argue that, as long as it can locate a "desert" in which to adhere to county lines, it then gained free rein to engage in racial gerrymandering the population centers that are the lifeblood of any voting district.[15]

Georgia's 1992 redistricting plan maintains but token contiguity throughout its various districts. Dr. O'Rourke characterizes the Eleventh District as merely a "conglomeration of dissimilar places." Tr. III, 134. Some of these places, he observed, were connected by "narrow threads." In his Supplemental Report (Pl. Ex. 85, at 8), he references several areas where the Eleventh "barely satisfies the test of contiguity." In the Richmond County "hook", the district narrows to the width of the local airport. In

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[15] A similar disrespect for political subdivisions is evident in the Second District. There, twelve counties are split. In each, the district includes a highly disproportionate share of the county's black residents. In Bibb County, the Second lassos in 82.4% of the county's black citizens. In Dougherty County, the figures rises to 85%. In Muscogee County, the figure rises still further, to 86.9%. As shown at J.A. 135-136, the inclusion of black voters in the Second District, via gerrymandered lines, had a determinative impact upon the district racially.

Effingham County, the Eleventh District contracts to a strand less than ½ mile wide. In Savannah, the district sends a tentacle through a breach in East Victory Drive that is even narrower. In Henry County, the western edge of the district is but several hundred yards from the eastern border. In Chatham County, one connecting point consists of swamp land. Tr. III, 115. At another point, the district is nothing more than the water column of the Savannah River itself. Tr. IV, 161. In a state as large as Georgia, and in a district which is 260 miles long, this is a remarkable spectacle.

A district which violates, in Georgia's Attorney General's own words, "all reasonable standards of compactness and contiguity," provides strong objective evidence that something dramatic is impacting the district lines. The District Court found it is "practcally stipulated" (J.S. App. 43) that but for race, none of this would have been considered, let alone implemented. No prior congressional redistricting map in Georgia's history contains districts even remotely resembling the Eleventh.[16]

The DOJ sums up its discussion of traditional districting principles with the bald assertion that the Eleventh District "comports reasonably with Georgia's ordinary districting practices." DOJ Brief, p. 23. This is not a

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[16] While "communities of interest" were not specifically referenced in *Shaw*, a significant amount of time was devoted to this subject at trial. The DOJ, along with the Abrams Intervenors, argued that blacks constitute a distinct community of interest coextensive with their skin color. The Court rejected this for a variety of reasons, among them that poor blacks in Savannah do not feel some automatic bond to those living in black neighborhoods in Metro Atlanta, many of which are quite affluent. J.S. App. 45-46. Dr. O'Rourke provided "compelling testimony . . . making it exceedingly clear that there are no tangible 'communities of interest' spanning the hundreds of miles of the Eleventh District." J.S. App. 81; Pl. Ex. 85, at 10-29. Black medium income in DeKalb County, for example, is nearly 50% higher than black medium income in the next ranking county (Richmond) and more than twice as high as black medium income in the lowest ranking eight counties.

serious argument. Surely if the DOJ was aware of a prior Georgia congressional district dominated by tails, hooks, protrusions, with utterly indecipherable designs at the end of these appendages, it would have brought it to the District Court's attention. It most assuredly did not.[17]

The DOJ And The Demand For Maximization

Long before the DOJ provided formal notice that it would not accept anything less than the maximum number of majority-minority districts that could be constructed in the State, the DOJ had communicated this requirement to members of Georgia's Black Legislative Caucus, which was represented by the ACLU. As early as August, 1991, State Rep. Tyrone Brooks of Atlanta announced to the General Assembly:

> "We are simply trying to maximize our voting strength, and I think we are right in line with the mandate for the U.S. Department of Justice.
>
> The Justice Department is not going to say, well, the lines look funny, or you got a portion of Chatham, you got a portion of DeKalb, more citizens of DeKalb are in this plan than Chatham. They are not going to be concerned about trivial issues like that. They are going to be concerned about whether or not you're diluting the voting strength of minorities or whether or not you are maximizing the voting strength of minorities. That's the only thing that I get from Washington when I talk to the lawyers. They want to make sure that, wherever possible—that you are drawing majority-

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[17] The DOJ's assertion that districts the State "continues to draw" (i.e., in 1992) should serve as an "appropriate benchmark" for determining whether a district is highly irregular or bizarre is almost Kafkaesque. It was the DOJ's pummelling which drove the State to draw the Second, Third, Fifth, and Eighth and Eleventh Districts as it did. As Bob Hanner, Chairman of the House Reapportionment Committee, testified, the only thing DOJ officials were interested in was racial percentages. Tr. III, 256. Ultimately, the Georgia legislature "split virtually everything except homes to . . . maximize black percentages." Tr. III, 250.

> minority districts. *And that's all I hear. I don't hear them saying the lines look funny, the map looks crazy or it's a zig-zag or it's something someone just threw on the wall. I hear them saying, make sure you don't dilute, and make sure, wherever possible, you create majority black districts, and I don't hear anything different."*

Pl. Ex. 130, 16-18. (Emphasis added.)

While the DOJ studiously avoided the term "maximization" and the "wherever possible" standard in its written communications with the State, there is no question that the effect of its written communications was to require precisely what it told Representative Brooks was necessary to pass DOJ muster.

The technique used by the DOJ to coerce the State into maximizing the number of minority-majority districts was to exploit the "purpose" prong of Section 5 of the VRA. The initial plan offered by the State of Georgia was obviously not retrogressive since it doubled the number of majority-minority districts, from one to two.[18] In this litigation, the DOJ freely admitted that neither Georgia's first or second submissions were retrogressive.

In utilizing the "purpose" prong of Section 5 to impose its maximalist will on the State, the DOJ resorted to the concept of "pretext." J.S. App. 25-26.[19] Any plan

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[18] At a June, 1990 training conference of the State Legislature Reapportionment Task Force held in Baltimore, Maryland, then-Assistant Attorney General for the DOJ's Civil Rights Division, John Dunne, advised the attendees that the DOJ was going to take a particularly exacting approach to redistricting in Georgia. P.I. Tr. 17. Georgia's legislative leadership was determined to approach redistricting so as to "meet the mandates of the Justice Department. . . [T]hat was a positive thing the committee wanted to do." Tr. III, 252.

[19] Notwithstanding its admitted use of "confidential informants" to spy on State legislators and officials throughout the redistricting process, the DOJ presented absolutely no evidence at trial suggesting any effort to discriminate against minorities in the two congressional redistricting plans that were rejected by the DOJ. Indeed the only evidence was to the contrary. Tr. III, 221, 258.

which did not lump as many blacks together as another plan was deemed suspect. Of course, the DOJ had before it the ACLU's Max Black plan. It was obvious throughout the redistricting process that this was the standard by which all other plans would be judged. J.S. App. 20; Tr. I, 65.

Initially, the DOJ did not formally require that the State extend the Eleventh District to Savannah. Its initial rejection letter, dated January 21, 1992, raised a concern "that the Georgia legislative leadership was predisposed to limit black voting potential to two black majority districts", and made specific comments concerning the need to better recognize "the black voting potential" in the southwest (Second) district and in Baldwin County in the Eleventh. J.A. 105-106.

The DOJ's rejection letter did not specify what it meant concerning black voters in the Second District. However, as the District Court noted, to maximize the number of black districts in the State, it would be necessary to somehow place black population concentrations in Macon into the Second District, and extend the Eleventh to Savannah. This was the "linchpin" of Ms. Wilde's Max-Black plan. She had alerted the DOJ that it was the "key to drawing a third black district." Pl. Ex. 57. *See* J.S. App. 19-20.

Based on the information before him, Senate Majority Leader Wayne Garner became convinced that, despite the lack of specificity in the DOJ's rejection letter, no plan was going to gain DOJ approval unless the Eleventh was extended into Chatham County and the black residents of Savannah were gerrymandered into the district. He testified: "[L]ooking at this entire process and listening to the other members of the committee, I was of the opinion and told the Lt. Governor early on, I said if we're going to get a plan past the Justice Department and get us out of here and on to these elections, that district is going to have to go to Savannah. In talking with Ms. Meggers, my point was the district must have the highest

percentage of black population that we could get, [regardless] of where we have to go." Tr. III, 210. Solely to "get the percentages high enough" for the DOJ (Tr. III, 210), the Georgia Senate passed a plan in late February, 1992 containing an extension to Savannah in the Eleventh, and including black concentrations in Macon in the Second District by means of a tentacle extending into Bibb County.[20]

Senator Garner informed Georgia House Reapportionment Committee Chairman Mr. Hanner that in his view, the DOJ "was going to mandate" a district extending from DeKalb to Savannah. Tr. III, 254. However, the House would not go along "unless the Justice Department mandated us to do it in writing." Tr. III, 250. As Representative Hanner testified: "I thought it was ridiculous. I thought—I just didn't think we'd have to—I thought that was the max, and I did not think we would ever have to do that." Tr. III, 250; Tr. II, 69.

By letter of March 20, 1992, the DOJ made it explicit where it stood. Georgia's plea that the "extension of the Second District into Bibb County and the corresponding extension of the Eleventh into Chatham County, with all of the necessary attendant changes, violates all reasonable standards of compactness and contiguity" fell on deaf ears. In the Eleventh District, the extension to Savannah would be required. The DOJ rationalized this requirement by citing the February 1992 Senate Plan referenced above—the Plan that was passed solely because the Senate leadership believed it was ultimately going to be mandated by the DOJ. J.A. 124. As for the Second District, the DOJ now made it clear that it was going to require the inclusion of "black population concentrations in areas such as Meriwether, Houston, and Bibb [City of Macon] Counties." J.S. App. 124-125. The fact

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[20] The Senate Plan generated three majority-minority districts in terms of population, but not in terms if VAP. In terms of VAP, the Senate Plan was 58.66% black in the Eleventh District, but "only" 47% black in the Second. J.A. 63.

that the State had previously been forced to split counties elsewhere to satisfy the DOJ served as the "evidence" that the failure to split additional counties elsewhere at the DOJ's command was "pretextual." [21] J.S. App. 125. Since the Macon/Savannah trade had been "suggested to the legislature during the redistricting process", it simply had to be done. J.S. App. 125. Issues of compactness, contiguity, respect for political subdivisions and former district cores, local economic interests and the like were entitled to no consideration whatsoever.

All of the foregoing machinations aimed at minority vote maximization transpired prior to this Court's opinion in *Shaw v. Reno.* Faced with litigation on one, if not two fronts,[22] a legislative session which was over by April 1,

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[21] Although the DOJ cites earlier versions of metro Atlanta's Sixth District in its brief (DOJ Brief at 32-33), its rejection letters make no reference to it. Its configuration is unremarkable. The district had to split counties due to one-person one-vote and the need to maintain the majority-minority Fifth District.

[22] Absent DOJ preclearance, a State must obtain a declaratory judgment under Section 5 from the District Court for the District of Columbia before a redistricting law can take effect. If the failure to obtain preclearance results in a malapportionment, the State is subject to suit. In Georgia, such a suit was filed on February 12, 1992 in the U.S. District Court in Atlanta. The case, *Jones v. Miller*, C.A. No. 1:92-CV-330-JOF, was filed by Republican interests seeking to have the Court draw the State's Congressional district lines. The complaint also alleged a violation of Section 2 of the VRA and sought to have the Court draw "the maximum number of majority black districts" which could be drawn. Pl. Ex. 80, p. 4. The Court in *Jones* had indicated that, if a plan was not precleared by the close of the legislative session, it would "commence drawing a plan" on April 3, 1992. P.I. Tr. 148; Tr. V. 23.

The State Defendants moved to dismiss the Complaint in *Jones v. Miller* on February 20, 1992. It labelled the maximization effort "legally unsupportable" (Pl. Ex. 81, at 5) and asserted that "[t]his amounts to nothing more than a complaint that the State should have, but has not, sought proportional representation for minority citizens as a goal." *Id.* at 17. The State Defendants lambasted the claim as "not only unprecedented, but dangerous to the political process in this nation." *Id.* at 18. They noted how the resulting

candidate qualifying which was set to begin on April 27, a primary election in July and a general election in November, the State simply folded. Without formal committee review in either the House or Senate, the Georgia General Assembly hastily passed a third plan precisely as the DOJ had laid it out in its March 20 letter. This third plan was hand-carried to Washington on April 1, 1992. A letter granting preclearance was issued the following day.

In strictly numeric terms, Georgia's 1992 congressional redistricting plan was the proverbial political feast for blacks. Even though Georgia's black VAP was 24.59% for the State's total VAP, majority-minority districts constituted 27.27% of the State's eleven districts. In the Eleventh District, the lumping together of distantly located blacks and the extensive surgery to avoid whites resulted in a saturated district containing a black population of 64.07% and a black VAP of 60.36%.[23]

SUMMARY OF ARGUMENT

Incantations of historical discrimination cannot automatically conjure up remedial action. Governments must quantify the present day effects, if any, and insure there is a tight fit between the continuing consequences of the past discrimination and the remedy being implemented.

"racial polarization would encourage candidates of one race to be unresponsive to the needs or wishes of another race", thereby breeding "extremism in both races to the detriment of all citizens." *Id.* at 19. A Max Black plan in the State Defendants' words, "will most certainly have the effect and result of diminishing minority effectiveness in the political process." *Id.* at 4. There are astonishing words in light of the positions taken by the State Defendants in this case.

[23] The impact of racially gerrymandering congressional district lines for the purpose of creating majority-minority districts has a dramatic impact on the VAP in the remaining districts. These districts are now all overwhelmingly white in composition. Black VAP in these districts ranges from 3.47% to 20.32%, with the average being 12.9%. The racial polarization about which the State Defendants spoke so eloquently in *Jones v. Miller, supra*, has come to fruition.

In Georgia, the "remedy" was maximization, both of the number of majority black districts and the minority populations included within them. There is no connection between the "Max-Black" benchmark used by the DOJ and the narrow tailoring required whenever race conscious remedies are invoked, unless narrow tailoring is defined as proportional representation of the races. To argue otherwise is to fall victim to an entitlement mentality that demands indefinite dividends from a national debt that was truly due to past generations.

Appellees strongly disagree with the thesis of the State Defendants' appeal which argues that the existence of *any* non-racial factor which influenced, however slightly, any twist or turn of the district's boundary provides an exemption from the teachings of *Shaw v. Reno.* Unless a district is 100% black, there will always be some bit or piece of boundary not drawn *solely* to segregate the races. For example, it might be a land bridge moving the district from one concentration of minority voters to other distant populations. The racial purpose is still the same. Racial gerrymandering occurs when the State draws a district that artificially manipulates non-compact dispersed minority populations into a majority black district without regard for the State's traditional districting principles. The test of such a district's legality begins with the Voting Rights Act, but ends with the Equal Protection Clause of the Fourteenth Amendment.

Under the Fourteenth Amendment, racial classifications are "presumptively invalid and can be upheld only upon extraordinary justification." *Brown v. Board of Education,* 347 U.S. 483 (1954). The racial gerrymander of voting districts must be subject to the same constitutional scrutiny as any other legislative use of race. *Shaw* clearly so held. We should not turn away from the principles that give primacy to our constitution because the siren song of racially proportional representation deafens us to the subtle, but ultimately racial plea Intervenors make to exempt majority-minority districts from constitutional accountability.

Shaw v. Reno catalogs just why Appellants' vision of America's political landscape is inconsistent with our constitutional limitations on the use of racial classifications as a basis for legislation. Congress has defined the extent to which the federal government will involve itself at the State ballot box with the passage of the Voting Rights Act. Congress never dreamed this Act would mutate into a justification for racial gerrymandering to further the DOJ's mandate of proportional racial representation via a *de facto* affirmative action program purportedly designed to redress "past discrimination".

The Abrams Intervenors would eviscerate *Shaw* by denying Plaintiffs' standing. Do Appellants truly believe America is better off politically segregated because the end result may be more Black office holders? They seek to legitimize the gerrymander as "benign" discrimination when the tools used to fashion the racial gerrymander are straight out of *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) and *Plessy v. Ferguson*, 163 U.S. 537 (1896). The old rallying cry of 'separate but equal' has been reincarnated in the 'separate but maximized' demands of the Intervenors. Justice Douglas phrased it best, calling it the "separate but better off theory." *Wright v. Rockefeller*, 376 U.S. 52, 61-62 (1964).

Because of the extensive fact finding critical to any analysis of this type of claim, the District Court's judgment as to the existence of a bizarre district that is the product of racial gerrymandering must be affirmed unless clearly erroneous. And since the State has declined to defend this district once strict scrutiny is applied, the outcome of this case should be clear.

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO CHALLENGE RACIAL GERRYMANDERING

Leary of mounting a frontal assault to reverse *Shaw* so soon after its announcement, the Abrams Intervenors' chosen strategy is to limit its reach. To deny Plaintiffs' standing would completely eviscerate *Shaw* and redirect us from the path *Shaw* has blazed towards the color-

blind society all parties acknowledge to be the ultimate goal.

Only the Abrams Intervenors have raised the issue of standing before this Court.[24] Their argument is a simple one—Appellees have purportedly suffered no "individual harm" and therefore lack the requisite standing to challenge a majority black voting district constructed by means of a racial gerrymander.

The Abrams Intervenors' "individual harm" argument is really no more than a restatement of the dissenting view in *Shaw* that the plaintiffs suffered no "cognizable injury." *Shaw* resolved that issue by untethering the individual harm suffered "[w]hen voting districts are carefully planned like racial wards" (*Hays v. Louisiana*, Case No. 92-1522, Slip Opinion, at 10 (on remand)) from the concept of group harm inherent in the vote dilution setting relied upon by the dissenting Justices. Notwithstanding *stare decisis*, the Abrams Intervenors effectively ask this Court to overrule *Shaw* after the ink has barely dried.[25]

The theory is a dangerous one because of its consequences if it were ever accepted. Practically speaking, no

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[24] In light of *Shaw v. Reno*, the District Court denied their Motion to Dismiss for lack of standing in its entirety. Abrams J.S. App. 104-111. As to the voters, the three judge Court unanimously stated that the Motion "borders on frivolous." Abrams J.S. App. 110. No post-*Shaw* district court has denied voters standing to challenge the constitutionality of a congressional redistricting scheme. See *Hays v. Louisiana*, 839 F. Supp. 1188 (W.D. La. 1993); *Shaw v. Hunt*, 861 F. Supp. 408 (E.D. N.C. 1994); *Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994).

[25] The District Court's opinion acknowledges that, if Plaintiffs' claim were considered solely in the context of vote dilution or interference with their ability to cast a ballot, these Plaintiffs have suffered no individual harm. J.S. App. 33. The Court correctly observed, that *Shaw* was not addressing these harms, but the harm which occurs when the state "reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency has a whole." J.S. App. at 32, citing *Shaw*, 113 S.Ct. at 2828.

voter could ever challenge a racially gerrymandered majority minority district. This approach would sterilize *Shaw v. Reno* and wrongly insulate patently unconstitutional racial classifications in the context of voting districts from judicial review.

The argument also misperceives the nature of Plaintiffs' claim. *Shaw v. Reno* clearly recognizes a voters' entitlement to challenge the use of racial classifications in the creation of voting districts. As the District Court unanimously recognized, "the cases stress that unlawful racial gerrymandering and its resulting balkanization is harmful to citizens of *all* races. The injury flowing to an individual so classified for voting purposes is manifest from *Shaw*." Abrams J.S. App. at 11. This is not a vote dilution case brought by white voters. Plaintiffs bring the "analytically distinct claim" recognized in *Shaw* that the redistricting plan under review cannot rationally be understood as anything other than an effort to segregate voters into separate voting districts on the basis of their race without sufficient justification. *Shaw*, 113 S.Ct. at 2830.

Stripped to the bare wood, the Abrams' argument on standing is but a contention that overall proportionality —i.e., matching the percentages of majority white and majority black districts with the racial demographics of the entire state's population—*negates* any basis for constitutional scrutiny. They would forgive all intentional, race-based line drawing which creates majority black districts no matter how egregious the gerrymandering.[26]

This modern day version of "separate but equal" cannot be squared with the precedents of this Court premised

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[26] The standing defense parallels the increasingly time worn, if not now obsolete, contention that deployment of racial classifications perceived as beneficial to the minority are considered "benign" racial discrimination exempt from strict scrutiny. The Court has rejected this contention time and time again. *See e.g., Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Wygant v. Board of Education*, 476 U.S. 276 (1986). Every post-*Shaw* District Court decision has rejected the argument.

on the nondiscrimination paradigm which "embodies the idea that race-dependent decisions are unacceptable except in the most unusual and compelling circumstances." Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 U.Va.L.Rev. 633, 638 (1983). This principle has been a central feature of this Court's equal protection jurisprudence combatting government-sponsored separation of the races since *Brown v. Board of Education*, 347 U.S. 483 (1954).[27] In *Shaw*, the Court made clear the non-discrimination principle applied equally to voting districts.

In *Loving v. Virginia*, 388 U.S. 1 (1967), this Court found Virginia's anti-miscegenation statute barring interracial marriage unconstitutional. The Court rejected the State's argument that, since the law applied to white and black citizens alike, there was no violation of equal protection. The constitutional issue did not turn on proof of the law's effect (or lack thereof) on any particular racial group but on the government's sponsorship of racial classifications. The Court's decisions rejecting race-based jury selection, regardless of what race is being excluded, make the same point. *Hernandez v. New York*, 500 U.S. 352 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986).

Plaintiffs challenging intentionally-crafted, drastically irregular black majority voting districts possess the same credentials to complain as the *Loving* plaintiffs. While there is no constitutional right to vote in any particular election or to be a member of any particular district, voters do have grounds to complain if the district in which they vote cannot rationally be understood as anything other than an effort to segregate voters into separate voting districts on the basis of their race without sufficient

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[27] *See* e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971) (swimming pools); *Evans v. Abney*, 396 U.S. 435 (1970) (parks); *Gayle v. Browder*, 352 U.S. 903 (1956) (transportation); *Mayor of Baltimore v. Dawson*, 350 U.S. 877 (1955) (beaches); *Holmes v. Atlanta*, 350 U.S. 879 (1955) (golf courses).

justification. Under the Abrams' view of standing, the State could assign its citizens into racially segregated districts, loosened from all relevant geographical moorings, in order to achieve proportionality. Simply put, the argument makes no sense. If a citizen and registered voter in a gerrymandering congressional district cannot complain of the constitutional violation enunciated in *Shaw*, who can?[28]

The Abrams Intervenors finally argue that white citizens should not be able to complain about being included in a majority black district. That is but an exercise in rhetoric. It is the artificiality of the district stemming from the intentional manipulation of its racial makeup that raises the constitutional ante to the level of strict scrutiny. While the Intervenors scoff at the stigmatic harm a voter suffers by being included in what the public sees as a racially rigged district, Plaintiff Henry Zittrouer gave poignant testimony about what it was like to be irrelevant to the congressional politcal process, to know you and your family now live in a spindly land bridge made up, in large part, of uninhabited swamp land that is politically divorced from your home county. He is separated from his relatives by only a dirt road; but that defines the dividing line between congressional districts. Tr. V, 26-29. Henry Zittrouer became a brick on the highway of electoral busing. Constitutionally, he deserves the right to have his case heard.

II. THE DISTRICT COURT'S DETERMINATION THAT THE ELEVENTH DISTRICT IS THE PRODUCT OF RACIAL GERRYMANDERING IS NOT CLEARLY ERRONEOUS

The State Defendants no longer pretend the Eleventh District can survive strict scrutiny.[29] Instead, the State

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[28] Four of the Plaintiffs in this action are voters in the Eleventh District. The fifth, Plaintiff DeLoach, lost the 1992 democratic congressional runoff election to the current representative in the Eleventh, and desires to run again without the outcome being predetermined on the basis of race.

[29] In their Brief, the State Defendants never discuss strict scrutiny. They only assert that the district would pass muster under

hinges its appeal on one argument—that "bizarreness" is an essential element of Plaintiffs' claim and that this district is "not bizarre." Appellees disagree with the State Defendants' legal contention that "bizarreness" *per se* is an essential element in establishing an unconstitutional racial gerrymander. *See* J.S. App. at 30, 41-42; *Shaw v. Hunt,* 861 F.Supp. at 430-31; *Hays v. Louisiana,* 839 F.Supp. at 1194-95, 1202 n.46. However, regardless of how this legal issue is resolved, the State's case nevertheless depends on a factual issue—whether the Eleventh District satisfies a "bizarreness" threshold. Given the fact-intensive nature of the State's disagreement with the District Court's decision, it is important to first establish the appropriate standard of review.

This Court has made clear that the District Court's findings of fact are reviewed under the "clearly erroneous" standard. This rule has been specifically held to include ultimate findings of fact in Voting Rights Act cases. As stated in *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986):

> "[O]ur several precedents . . . have treated the ultimate finding of vote dilution as a question of fact subject to the clearly erroneous standard of Rule 52(a). *See, e.g., Rogers v. Lodge,* 458 U.S. at 622-627; *City of Rome v. United States,* 446 U.S. 156, 183 (1980); *White v. Register,* 412 U.S., at 765, 770."

In *White v. Register,* 412 U.S. at 769-770, this Court employed a similar analysis, stating:

> "[W]e are not inclined to overturn these findings, representing as they do abundant history and an intensely local appraisal of the design and impact of the . . . district in the light of past and present reality, political and otherwise."

"more intensive scrutiny" (State Brief, at 45), but provide almost no substantive analysis. At no point do the State Defendants propose a "compelilng governmental interest" to this Court, nor do they address the issue of "narrow tailoring." Apparently, the State Defendants urge an intermediate standard of review, rather than strict scrutiny, perhaps taking their cue from Justice Souter's dissent in *Shaw.*

Elsewhere in the *Gingles* opinion (478 U.S. at 79), the Court concluded:

> "Thus, the application of the clearly erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court's particular familiarity with the indigenous political reality without endangering the rule of law."

The same reasoning applies to whether a district's lines are highly irregular and whether racial gerrymandering has occurred. The rationale for the deference to the fact-finder is equally applicable in both types of cases. In each case, local district courts possess the knowledge and experience with the local jurisdiction at issue to make the factual determinations on which these cases must turn. *See Wright v. Rockefeller.*[30]

The District Court here brought its considerable local knowledge to bear in this case, as evidenced by its exhaustive opinion. That knowledge is an indispensable ingredient to any sound judgment as to whether this district is characterized by such irregularity and so departed from Georgia's traditional districting principles for racial reasons that it constituted a suspect racial gerrymander which must stand the test of strict scrutiny.

Although the dissenting opinion focused exclusively on the factual issue of "bizarreness."[31] it did not contend

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[30] The standard of review under the clearly erroneous standard is well settled. A finding is only clearly erroneous when "although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948). "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969).

[31] The dissenting judge considered "bizarreness" as an element of the Plaintiffs' claim, barring any inquiry into legislative intent until the district was determined to be bizarre. The majority opinion positions "bizarreness" in the standing analysis, determining that in the absence of where a district does not "advertise"

that the majority opinion was "clearly erroneous" in any aspect. In fact, Circuit Judge Edmondson prefaced his dissent by "cheerfully admit[ing] that my colleagues may well be right about what is the correct result of this case." J.S. App. at 92. With this preamble, he signaled to all readers that he had no cause to claim the majority's factual findings should be reversed as "clearly erroneous."

By Appellants' failure to identify what, if any, factual findings of the District Court they contend are clearly erroneous, they impliedly accept what is abundantly clear from the record below—that all of the District Court's findings are amply supported by the evidence presented at trial.

A. Objective Criteria to Govern Application of Shaw Already Exist

The State Defendant's complain about the absence of "objective standards" with which to define a racial gerrymander. They seek more standards to help it better balance the demands of the Voting Rights Act, as enforced by the DOJ, with the constitutional rights of its citizens to be free of race based gerrymandering.[32] That

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race-based line drawing, the harm referenced in *Shaw* is absent and citizens have no basis for suit. J.S. App. 30, 42 n.24. The District Court considered a district "bizarre" where, as here, it is not compact and its lines were "blatantly manipulated". J.S. App. 32-33 n.17. Plaintiffs do not believe a separate finding of "bizarreness" is necessary either as an element of a claim or as part of standing. The fundamental issue is whether racial gerrymandering as defined in *Shaw* has occurred. The distinction, however, is more theoretical than real.

[32] The State Defendants make this argument in a strained effort to involve the recent decision in *Holder v. Hall*, 62 U.S.L.W. 4728 (1994). They argue the absence of "objective criteria" for defining racial gerrymandering somehow immunizes it from constitutional challenge. Once again, the confusion is traced to an attempt to employ the rationale of a vote dilution case to a race discrimination case. In *Holder*, the Court could find "no principled reason" to pick betewen varying sizes of a county commission. This Court has already articulated its reasons for condemning the intentional

is "statespeak" for saying the DOJ's administration of the Voting Rights Act in Georgia and throughout the South exceeded its statutory bounds. Appellants believe that, once the DOJ is returned to the oversight role that Congress intended it serve under Section 5,[33] the State will have ample "breathing room" between its obligations under the Act and the constitutional rights of citizens assigned to racially gerrymandered districts.

The defendants involved in reapportionment—Speaker Murphy and Lt. Governor Howard—had little trouble identifying racial gerrymandering. It involved an overriding racial objective advanced by abandonment of traditional districting principles and the racial division of Georgia's cities. Georgia's plight was not due to an unawareness of the fact it was racially gerymandering; it was borne of the unrelenting advocacy of the ACLU for a "Max-Black" approach to districting that the DOJ enforced via its Section 5 powers. Without *Shaw v. Reno* to warn Georgia there was a constitutional consequence to unrestrained "Max-Black" gerrymandering, Georgia chose the sure road to DOJ preclearance and avoidance of judicial redistricting under the pending malapportionment action of *Jones v. Miller*.

III. THE LEGISLATION ESTABLISHING THE ELEVENTH DISTRICT IS SUBJECT TO STRICT SCRUTINY

In this case and in *Hays*, the DOJ offers a highly restrictive view of what triggers strict scrutiny of a racial gerrymander. It argues legislative intent should not be the determinant of whether strict scrutiny applies. Instead,

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use of racial gerrymandering (in the absence of facts that would satisfy the strict scrutiny such classifications must undergo) in *Shaw*.

[33] The DOJ's contention that it can essentially litigate theoretical Section 2 claims on the uneven playing field of a Section 5 review has little legal authority to support it. Georgia has never accepted this construction of Section 5. Georgia won the point before a three judge court in *Georgia v. Reno*, Civil Action No. 90-2065 (D.D.C., Order of February 3, 1995).

it reads *Shaw* as mandating some type of "beauty contest" as a predicate to strict scrutiny.

The DOJ is mistaken. While it would be very difficult to even conceive of a congressional district that would be challenged (let alone subjected to strict scrutiny) without highly irregular features tied to race, it is the purposeful classification of citizens according to race to which the Equal Protection clause is directed. *Shaw*, 113 S.Ct. at 2824. It is these classifications that "threaten to stigmatize individuals by reason of their membership in a racial group and to incite racial hostility." *Id.* at 2824. It is the *purpose* to divide citizens according to race which demands close judicial scrutiny. *See Croson*, 488 U.S. at 493.

A statute which draws "explicit racial distinctions" on its face will always be subject to strict scrutiny. However, merely because a statute is race-neutral on its face does not exempt it from strict scrutiny if it is, in fact, "unexplainable on grounds other than race." *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Whether a facially race-neutral statute is "unexplainable on grounds other than race" is necessarily a fact-intensive inquiry. It is ultimately the legislative purpose which must be determined. The fact that the legislation at issue relates to redistricting does sion was "whether Appellants have sustained their burden not alter the essential inquiry. Indeed, in *Wright v. Rockefeller*, the question for decision was "whether Appellants have sustained their burden of proving that the boundaries of particular districts were purposefully drawn on racial lines." 376 U.S. at 67 (Goldberg, J. dissenting).

Shaw should not be limited by the DOJ's suggested reading that a district must meet some pre-determined level of overall "bizarreness" before being subjected to strict scrutiny. To the contrary, this Court indicated in *Shaw* that "a racial gerrymander, once established, should [not] receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race." *Id.* at 2826. As if to invoke the present case, the Court noted that proof of a racial gerrymander "some-

times will not be difficult at all." *Id.* Two distinct scenarios were cited. One was the situation presented in *Gomillion v. Lightfoot,* where district lines were "so highly irregular" that they could not rationally be understood as anything other than an effort to segregate voters. The second scenario "would be a case in which a state *concentrated a dispersed minority population in a single district by disregarding traditional districting principles such as compactness contiguity, and respect for political subdivisions.*" *Shaw, supra* at 2826-27 (emphasis added). This language does not suggest some special geometric threshold for strict scrutiny whereby a district must maintain a particular level of visual "bizarreness" throughout. To Appellees, it suggests a Court deeply concerned, not about appearance *per se,* but purposeful race-based line drawing which balkanizes our electorate and reinforces "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and vote for the same candidates at the polls." *Id.* at 2827.

Under *Arlington Heights* and *Hunter v. Underwood,* 471 U.S. 222-228 (1985), once a racial classification is shown to have been a "substantial" or "motivating" factor behind an enactment, the burden then shifts to the state to demonstrate that the law would have been enacted without this factor. For practical reasons, the District Court here added the requirement that race be the "overriding" or "predominant" force determining the lines of the district. J.S. App. 36. The Court deemed this elevated burden necessary in the redistricting context since race awareness will often impact district lines in light of the Voting Rights Act and the current attitude of the DOJ. J.S. App. 38.[34] With this elevated standard, the

[34] Plaintiffs appreciate the concerns of the District Court but do not believe it is necessary to depart from traditional equal protection analysis and the "substantial" or "motivating" test in the context of redistricting. "Properly applied, [the] distinction

Court made clear the legislature "may intentionally consider race in redictricting—and even alter the occasional line in keeping with that consideration—without incurring [strict scrutiny]. It is the *abuse* of that privilege, exposed to the world via perverse district shapes 'unexplainable on grounds other than race' that sparks further examination." J.S. App. 39.

The District Court correctly emphasized that race need not be the *sole* motivation behind a redistricting plan before it is subjected to strict scrutiny. Such a standard is fundamentally inconsistent with *Arlington Heights* and *Washington v. Davis*, 426 U.S. 229 (1976). In redistricting, as in any other area of the law, race will almost never be literally the only factor which influences legislation. The notion that an equal protection claim under *Shaw* cannot exist unless 100% of the district line is the product of racial gerrymandering would trivialize *Shaw* and immunize racial gerrymandering from established equal protection analysis contrary to the *Shaw* Court's express pronouncement that racial gerrymandering, once established, should not receive less scrutiny under the Equal Protection clause than other state legislation classifying citizens by race. *Id.* at 2826.[35]

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between 'race-conscious' and 'race-based' districting should prevent legislatures from having to defend all districting plans under the strict scrutiny standard." *Shaw v. Hunt*, 861 F. Supp. at 42. In the vast majority of cases, proof of the "requisite intent will be difficult indeed." *Id.* at 433, n.20.

[35] *Arlington Heights* severely undercut the DOJ's position that only the district lines themselves can be examined in determining whether a district is subject to strict scrutiny. *Arlington Heights* calls for an "inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* at 266. In addition to examining impact, district courts are advised to examine the historical background of the decision, the specific sequence of events leading up to the challenged decision, unusual procedural or substantive departures, legislative history and legislator testimony. Contrary to the DOJ's representation, the District Court here was not left to rely on "after the fact testimony of some of the legislators who had been involved in the districting process" (DOJ Brief at 22) to ascertain legislative purpose. The Court relied primarily upon the District's dramatically irregular configuration and the racial

The District Court's unassailable findings that race dominated the formulation of the Eleventh District and that this caused a bizarre configuration "unexplainable" on grounds other than race (J.S. App. 67) renders further discussion of applicable standards largely academic. If the Eleventh District is not subject to strict scrutiny under *Shaw*, it would be difficult to conceive of a district which is.[36] It would simply be disingenuous to contend this district is not dramatically irregular in its shape, particularly if one understands Georgia's geography, compares it to decades of Georgia districting history, where compact districts had identifiable economic bases, and appreciates the predominant role of its 159 counties as the building blocks of its congressional districts. It would be equally disingenuous to deny that this dramatic irregularity is the product of anything but race.

IV. THE ELEVENTH DISTRICT CANNOT SURVIVE STRICT SCRUTINY

A. Third Parties Cannot Supply Compelling Governmental Interests Which The State Refuses To Acknowledge

The State Defendants make no offer to defend the Eleventh District once strict scrutiny applies.[37] As a self-

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divisions occasioned thereby. While legislators certainly provided compelling, uncontradicted testimony as to legislative intent, the DOJ's own communications with the State and the ensuing legislative enactments speak volumes on the subject.

[36] The State Defendants try to generate conflict between the District Court's opinion and *Voinivich v. Quilter*, 113 S.Ct. 1149 (1993) by overstating the District Court's holding to be a ". . . rejection of all benign race-conscious redistricting. . .". State Brief at p. 33. That is not a fair reading of the opinion. There is a crucial difference between race conscious districting that comports with traditional districting principles (e.g., respect for county boundaries in redistricting was constitutionally required, 113 S.Ct. at 1152) and the racial gerrymandering confronting the Court in this case. However, no equal protection issue was raised in *Voinivich* and the Court expressed no view on how such a claim might be evaluated." 113 S.C. at 1157.

[37] The State Defendants have never asserted the Voting Rights Act as a compelling governmental interest. They did once send

appointed surrogate for the State, the DOJ proffers the Voting Rights Act and "eradicating the effects of past discrimination" as compelling governmental interests justifying the race-driven configuration of the Eleventh District. (DOJ Brief, p. 39). This proffer by the DOJ raises an important issue—may a third party articulate a compelling governmental interest in defense of the State's legislative use of race classifications when the State specifically *denies* that the State considers such interest compelling and *denies* that it motivated the State to employ racial classifications?

The precedents of this Court have always called upon the State to speak for itself in asserting the basis for its actions. In *Regents of University of California v. Bakke*, 438 U.S. 265, 306 (1978), the Court stated that "to justify the use of a suspect classification, *a state must show* that its purpose or intent is both constitutionally permissible and substantial." (Emphasis added). In *Kramer v. Union Free School District No. 15*, 395 U.S. 621, 626 (1969), the court stated that "[i]n determining whether state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, *the interest which the state claims to be protecting*, and the interest of those who are disadvantaged by the classification." (Emphasis added). In *Croson*, 488 U.S. at 493 (1989), the Court noted that the "purpose of

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up the trial balloon of "proportionality" as a compelling governmental interest. This was an obvious after the fact rationalization which the District Court flatly rejected. J.S. App. 54-55. On appeal, they obliquely urge the Court to consider some intermediate standard of review. *See* footnote 29 *supra*. Justice O'Connor's majority opinion in *Croson* speaks directly to the suggestion that some "intermediate" level of review be employed where so called benign discrimination" is challenged:

"Any watered down version of equal protection effectively assures that race will always be relevant in American life and that the ultimate goal of eliminating entirely from governmental decisionmaking such irrelevant factors as . . . race will never be achieved." 488 U.S. at 495 (quoting *Wygant v. Bd. of Educ.*, 476 U.S. 267, 320 (Stevens, J. dissenting).

strict scrutiny is to smoke out illegitimate uses of race *by assuring that the legislative body* is *pursuing a goal* important enough to warrant the use of a highly suspect tool." (Emphasis added). All of these cases illustrate that it is a state's responsibility to advance the interest it deems sufficiently "compelling" to justify employing suspect classifications in legislative enactments.

This Court not only requires states to articulate a constitutionally cognizable compelling governmental interest, but in the context of affirmative action insists the state justify its use of a racial classification before, rather than after, it deploys it. *See Croson,* 488 U.S. at 501; *Bakke,* 438 U.S. at 310 (states must identify specific evidence of racial discrimination before utilizing racial classifications); *Wygant v. Jackson Board of Education,* 476 U.S. at 277 (1986) (public employer must ensure that before it embarks on an affirmative action program, it has convincing evidence that remedial action is warranted). If *post hoc* rationalizations by a state are insufficient, surely *post hoc* rationalizations offered by third parties cannot pass muster. Herein, the evidence is unrefuted that the *only* "interest" driving the State prior to the passage of the 1992 redistricting plan "was to pass a plan that the Justice Department would approve." Tr. II at 66.

None of this was lost on the District Court. Its observed that the "articulated 'compelling' justifications appear to be *post hoc rationalizations*"; nevertheless, the Court "address[ed] all possibilities" and correctly found them lacking. J.S. App. at 53.

B. The Lines of the Eleventh District Are Not Arguably Necessary Under Section 5 Of The Voting Rights Act

One "compelling governmental interest" which the DOJ advances to justify its demand for three majority-minority districts in Georgia and the resulting mayhem on the Eleventh District is Section 5 of the VRA.

The District Court determined that the lines of the Eleventh District are not "reasonably necessary" under

Section 5. In so doing, it followed the "reasonably necessary" standard referenced by this Court in *Shaw*. *Id.* at 2831. The DOJ concedes that Georgia's prior submissions were non-retrogressive under *Beer v. United States*, 425 U.S. 131 (1976). It attempts to fashion an argument under the "purpose" prong of Section 5.

The notion that either of Georgia's first two submissions in 1991-92 were enacted for the "purpose" of denying or abridging the right to vote of black citizens is almost surreal. In each of these submissions, the number of majority-minority districts in Georgia *doubled* in comparison to the 1982 plan, which was also precleared.[38] No evidence was offered at trial that the legislature, by creating an additional majority-minority district, sought to *suppress* the ability of African-Americans to participate in the electoral process. Thomas Armstrong, the DOJ attorney assigned to the Georgia review team, "could not recall seeing any evidence of discriminatory motives on the part of the Georgia Legislature. Tr. IV, at 145-50." J.S. App. at 14.

Section 5 was enacted for the purpose of breaking the cycle of "unremitting and ingenious defiance" of the constitutional guarantees of non-discrimination in voting by covered states. *See Katzenbach v. South Carolina*, 383 U.S. 301, 309 (1966). The Section 5 review process is not a sword designed to force states to maximize minority voting strength. Preclearance was never intended to become a code word for proportional representation of minorities. To the contrary, the Act spe-

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[38] The DOJ cites *Bushbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) for the proposition that Georgia enacted a redistricting plan in 1982 which was motivated by a discriminatory purpose. The district lines at issue in *Busbee* and in the case at bar are worlds apart. *Busbee* involved *only* a small portion of the lines pertaining to Atlanta's Fifth District. No suggestion was made by the DOJ at that time that the failure to create even a single additional majority-minority district in the State outside metropolitan Atlanta evinced a discriminatory purpose on the part of the State. Apparently, the DOJ's *definition* of "purpose" under Section 5 has changed drastically since that time.

cifically disavows any such purpose. *See* 42 U.S.C. § 1973(b). There is nothing in the "purpose" prong of Section 5 which mandates that a state rig together in an unprecedented manner distantly located black population clusters while carefully avoiding white population in the process. The District Court has well documented the excesses engaged in by the Department of Justice, both in its misconstruction of its function in a Section 5 review and its the documented *de facto* delegation of critical preclearance decisionmaking functions to the ACLU. The State strongly protested the unprecedented approach the DOJ took to redistricting. J.A. 108, 118. Its traditional districting principles were ignored, existing districts were ripped apart and scores of cities dissected just for their black populations. J.A. 128.

The DOJ's approach can find legal footing *only* if "purpose" under Section 5 is defined to mean anything less than maximizing the number of majority-minority districts within a state. Such a grossly expansive definition has no arguable place in the law. *Johnson v. DeGrandy*, 114 S.Ct. 2647 (1994) (Kennedy, J. concurring). Yet, this is precisely the operative definition the DOJ imposed on Georgia and asks this Court to sanction.

The DOJ would have this Court jettison the "reasonably necessary" standard used for the narrow tailoring analysis as referenced in *Shaw v. Reno*, 113 S.Ct. at 2831, and followed by the District Court. J.S. App. 65. It contends that race-based districting is always narrowly tailored if the State has a "strong basis in evidence" for believing that it would not be able to prove the absence of a discriminatory purpose and that a letter from the DOJ declining to grant preclearance under Section 5 provides that "strong basis in evidence" unless its findings are "clearly insupportable." DOJ Brief, at 31.

The DOJ's argument is frightening one. It vaporizes the concept of "strong basis in evidence." Under Section 5, the DOJ is empowered to "interpose an objection" to a plan. It has no established fact-finding procedures, no

administrative hearing and no discernible standards for evaluating information. With its confidential informants, it largely operates in secret and goes to great effort to maintain that secrecy. *See* J.A. 34. The DOJ would, in effect, elevate itself to the role of final arbiter of what survives strict scrutiny, and hence, of what is constitutional. Courts, under this approach, become largely a rubber stamp.

Leaving aside for a moment the serious legal flaws in such a position, the facts will not support the DOJ's contention. The State Defendants nowhere concede they could not have demonstrated an absence of discriminatory purpose in Georgia's first two submissions. In their Jurisdictional Statement (at p. 5), they provide their own explanation for caving in which flatly *contradicts* the DOJ:

> Because of the great costs, the delays, and the uncertainties of litigation, a majority of the legislature voted against pursuing a Section 5 preclearance action in the District of Columbia District Court. It appeared that such could not have been concluded in sufficient time to allow a legislatively enacted plan to go into effect for the 1992 elections. Hence, the failure to enact the plan now at issue would likely have put the State under a court-ordered plan for the 1992 elections by default.

Even if the DOJ were somehow right as to the constitutional significance of its rejection letters, any claim of a Section 5 "purpose" violation is "clearly insupportable." While the DOJ works hard to downplay its pre-*Shaw* maximization policies and its goal of proportional representation before this Court, the record in this case is overwhelming. In practice, the DOJ seriously abused Section 5 to effectuate these policies. The District Court's characterization of the Department's conduct as "an embarrassment", "a search for maximization by the crudest means", and the pursuit of "maximization of the black vote, whatever the cost" (J.S. App. 27, 12-14 n. 4, 28) are not only correct, but they are supported—in the

State Defendants' own words—by "abundant evidence." J.S. at 3. As the District Court found, these policies led the DOJ to search for black voters in a manner which "completely ignored legitimate non-racial interests." J.S. App. 67. The District Court did not simply find that the requirements of the Voting Rights Act had been exceeded. It found the lines of the Eleventh District "unexplainable as anything other than an effort to exclude white voters" and to include black ones. J.S. App. 67. It decried the "gulf" between the VRA and the enacted plan. *Id.* Thus, even by the DOJ's own improper test, the Eleventh District cannot be justified on the basis of Section 5.

C. The Lines Of The Eleventh District Are Not Arguably Necessary Under Section 2 Of The Voting Rights Act

In offering Section 2 as a justification for the Eleventh District, the DOJ again asserts a "compelling governmental interest" which the State expressly disavows. *See* State Defendants' Trial Brief, at 30-31. Essentially, the DOJ argues that, even though the State did not appreciate it then and does not contend it now, it had a "strong basis" in evidence for believing that the Eleventh District was necessary to avoid a Section 2 violation.

The legislation establishing the Eleventh District is not arguably narrowly tailored to further compliance with Section 2. This Court's well established preconditions for a Section 2 claim in a districting case are explained in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). A plaintiff must show the minority population is (1) sufficiently numerous and *compact* to constitute a majority in a single-member district, (2) is politically cohesive, and (3) that whites vote as a block to defeat the minority's preferred candidate. Only when a plaintiff establishes all of these preconditions must the Court determine whether, under the totality of the circumstances, minorities have been denied an "equal opportunity" to "participate in the political process and to elect representatives of their choice." *Id.* at 80.

The DOJ cannot get past even the first *Gingles* precondition. The minority populations in DeKalb, Richmond and Chatham Counties "are so far apart that the DOJ's insistence that they are 'compact' renders the term meaningless." J.S. App. at 80. In its quest to implement a Max-Black plan and thereby achieve "proportionality plus",[39] the DOJ was simply oblivious to the concept of compactness in the preclearance process.

Although unnecessary to the disposition of the DOJ's argument, the District Court did not limit its analysis to the first *Gingles* precondition. It assessed all of them. With respect to voting patterns among blacks and whites, the Court found "a significant degree of cross-over voting in Georgia and the Eleventh District, with white voters slightly more willing to vote for black candidates than black voters for white candidates." J.S. App. at 83. The Court further found that percentages of black voters in the Eleventh District are far more than needed to afford blacks within the district an equal opportunity to elect a candidate of choice. J.S. App. at 88.[40]

Eleventh District election results verify the District Court's conclusions. In the 1992 Democratic primary,

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[39] Measured by VAP, blacks are in fact *overrepresented* from the standpoint of proportionality by 2.68%. In *Growe v. Emison*, 113 S.Ct. 1075, 1083 n.4 (1993), this Court noted that Gingles repeatedly refers to VAP, not population and that other courts have likewise referred to VAP in Section 2 cases.

[40] The Court observed that under the analysis of Dr. Katz, the expert retained by the State Defendants, a black candidate has roughly a 73% probability of winning an election in the Eleventh District, and that this number would presumably be higher if the assessment were made on the basis of VAP. J.S. App. 88. Plaintiffs' experts, Dr. Weber, concluded on the basis of extensive election analysis that the Eleventh District in its present configuration is overly safe in the general, in the Democratic primary, and in the Democrtaic run-off elections from the standpoint of assuring the election of a candidate of choice of African-American voters. Pl. Ex. 82 at 32. His reconstituted election analysis of precincts within the Eleventh District confirms that black candidates received an average of 65.7% of the vote in ten elections. J.S. App. at 86; Pl. Ex. 84F.

the four African-American candidates collectively received 74.8% of the vote. In the 1992 run-off, the black candidate received 56.4% of the vote. In the general election, that candidate received 73.1% of the vote. Pl. Ex. 84. In 1994, there was no Democratic opposition and another romp in the general election.

The conclusion that the Eleventh District is overly safe from the standpoint of assuring the election of an African-American is bolstered by the electoral history in the other two majority-minority districts after the 1992 plan was enacted. In both the 52.33% black VAP Second District and the 57.46% black VAP Fifth District, African-Americans have prevailed in each and every congressional contest in which an African American has participated.

The Eleventh District, with its 60.36% black VAP, represents nothing more than an arbitrary and needless application of the DOJ's now-infamous 65% rule, resulting in pointless electoral overkill.[41] No law dictated the bizarre contortions of geography necessary to garner the talismanic 65% black population quota the DOJ/ACLU established as the population benchmark. Election of a black candidate became a certainty in this district.

Whatever motivations drove the DOJ and, henceforth Georgia's 1990 redistricting experience,[42] the results un-

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[41] *See* Brace, et al., "Minority Voting Equality: The 65% Rule in Theory and Practice," 10 Law & Policy 1 (1988) (concluding that such a percentage makes election of a black candidate a "certainty."). Brace concluded:

> ". . . [A]s blacks are catching up and even surpassing whites in their levels of registration and turnout . . . use of the 65 percent figure may have the same effect *as the classic gerrymander . . . .*"

[42] As to the DOJ's possible motive, *see* Aleinikoff, et al., "Race and Redistricting: Drawing Constitutional Lines After *Shaw v. Reno*", 92 *Mich. L. Rev.* 588, 589, n.8 (1993). *See also* Pl .Ex. 70-75, 162. Thanks to the DOJ's relocation of the State's minority population into separate districts, and the resulting destruction of biracial coalitions that elected democrats, Republican's increased their number in the delegation from one in 1990 to seven as of the last election. These results confirm the thesis many

derscore Justice Brennan's warning in *United Jewish Organizations v. Carey*, 430 U.S. 144, 171 (1971)[43] regarding the dangers of allowing race to drive the creation of voting districts. The Georgia experience with linking its widely dispersed black constituents into separate districts demonstrates how the oversimplistic theory that more majority black districts equals more black political power can be contorted into nothing more than a stratagem to destroy existing biracial coalitions that are the prototypes for how society must function politically if we are to achieve color blindness in the context of governmental action.

While the DOJ is free to disagree with the District Court's factual conclusions, it has not shown them to be clearly erroneous. Given the Court's meticulous factual findings and analysis, no legitimate claim can be made that the legislation creating the Eleventh District is narrowly tailored to further any interest under Section 2.

D. The Desire To Redress The Unquantified Effects of Historical Discrimination Is Not A Compelling State Interest

The alternative compelling state interest offered by the DOJ is the remediation of the effects of historical discrimination.[44] The notion that a segregated pass will al-

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commentators suggested well before the 1990's round of redistricting. *See, e.g.*, Brace, Grofman, Handley, "Does Redistricting Aimed to Help Black Necessarily Help Republicans?", 49 Journal of Politics 69 (1987).

[43] "An effort to achieve proportional representation . . . might be aimed at aiding a group's participation in the political process . . . or, on the other hand, might be a 'contrivance to segregate' the group . . . thereby frustrating its potentially successful efforts at coalition building across racial lines." *Id.* at 172-173.

[44] It is characterized as "eradicating the effects of past dicrimination which have resulted in racially polarized voting and a diminution of the opportunities of minority voters to elect candidates of their choice." DOJ Brief, at 39. This interest ultimately merges with an assertedly compelling interest in "proportional representation." *Id.* at 40.

ways justify manipulation of a state's voting districts to fashion artificial black majorities through gerrymandering district lines finds no support in the law.[45]

The District Court flatly rejected this argument. Apart from the fact Georgia never articulated any such interest during redistricting, the District Court held that a compelling governmental interest in remedying prior discriminatory voting practices does not exist independent of the Voting Rights Act. J.S. App. 56-57. It reasoned that the Act is itself an "expansive remedial scheme imposing federal authority over much of the country's state and local voting systems." J.S. App. 57. Its reach is so pervasive that, if any state's remedial program "exceeds the requirement sof the VRA, the separate interest in further increasing minority voting strength is no longer compelling." *Id.* at 57. The District Court's analysis is correct.

Racial classifications that work to guarantee public benefits to persons based on the color of their skin have no place in this society unless they are temporary remedial measures that specifically redress the quantified damage the discrimination has caused. Racial classifications that define the boundaries of voting districts, where those boundaries are aberrational and not required by the Voting Rights Act, are incapable of meeting the constitutional test for the remedial use of what is, in its essence, racial discrimination. Once gerrymandered districts are in place, they are institutionalized through the nonretrogression principle of Section 5. Considerations such as incumbency protection and respect for the cores and boundaries of existing districts work to cement the gerrymander into the social and political foundations of the afflicted state, contrary to this Court's long standing mandate that such remedial racial classifications be temporary in nature.[46]

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[45] Mr. Chief Justice Rehnquist made the point in his dissenting opinion in *Brooks v. Mississippi*, 469 U.S. 1002, 1003 (1984).

[46] The stage whisper pervading the Intervenors' briefs is that the South, Georgia included, is still in need of "reconstruction."

Historical discrimination cannot be recognized as a "compelling states interest" in this case. It is undisputed that "the General Asembly never articulated such lofty goals during the 1990-1992 redistricting" process. J.S. App. 56. There is not one whit of evidence to suggest that the Eleventh District was "compelled" by anything other than the DOJ's commands. Tr. II, 73. Georgia's first submission to the DOJ—itself a product of the DOJ's advance warning as to how vigorously the VRA was going to be "enforced"—provides some idea of what Georgia sought to accomplish in the way of "eradicating the effects of past discrimination." It is vastly different from the current plan, and was so perceived at the time. P.I. Tr. 107; Tr. II, 69.[47]

Yet, the State's own expert witness, Lisa Handley, has done extensive research into the question of black representation in the South and the factors that impact it. *See* Grofman and Handley, "Black Representation Making Sense of Electoral Geography at Different Levels of Government", 2 Legislative Studies Quarterly, XIV, 265 (1989). She concluded that ". . . differences in *geographic dispersion* among scuthern and non-southern blacks . . . account[s] almost completely for the present-day pattern of differences in black Congressional representation." *Id.* at 269 (emphasis added). The study categorically ". . . ruled out . . . differences in levels of Southern and non-Southern racism or in levels of black electoral participation in the South and the non-South. The study's conclusion was ". . . once we control for urban concentrations of black large enough to form a majority of the constituency in a Congressional district, differences between the South and non-South in the degree of black Congressional representation effectively vanish." *Id.* at 269.

[47] The State Defendants argue that "the final plan . . . is fundamentally like the initial plan." State Brief, at 49. This is a startling assertion none of the people who participated in the reapportionment process agreed with. The initial plan created two majority-minority districts. The Eleventh combined black voters in Macon with black voters in DeKalb County and Augusta. Macon is approximately 90 miles away from Atlanta. Savannah is approximately 260 miles away. Moreover, ferreting out black voters in Macon and connecting them to the Second District required outrageous gerrymandering. Georgia's Attorney General surely did not see the initial and final plans as remotely similar, bitterly complaining to the DOJ that these "extension[s] . . with all of the

Georgia's 1990 Congressional redistricting experience was a case in point for the fact that the wide dispersion of Georgia's black population provided an insurmountable constitutional hurdle to the DOJ's quest for two more majority black districts. For the DOJ, the issue was not must we maximize, or even should we maximize. Instead, the test became *could* we maximize. Rather than accept the demographics as they existed, tecnology made maximization possible through cartographical gymnastics conceivable only in cyberspace.

This Court has not specifically addressed the question of whether a state has a compelling governmental interest to engage in race-based redistricting beyond what is reasonably necessary under the Voting Rights Act.[48] However, the interest being advanced here is nothing less than a call for proportional representation, as nothing else is left apart from the Voting Rights Act. The DOJ concedes as much. DOJ Brief at 40. Such a compelling governmental interest is unthinkable. The idea of designating congressional seats by race would "tend to entrench the very practices and stereotypes the Equal Protection Clause is set against." *Johnson v. DeGrandy*, 114 U.S.

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necessary attendant changes, violate all reasonable standards of compactness and contiguity." J.A. 108. 118.

[48] *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977) was decided prior to the 1982 amendments to the VRA which incorporated a "results" test into Section 2. In *UJO*, three Justices appeared to recognize a state interest in minimizing the consequences of racial bloc voting apart from the VRA. *Shaw, supra*, at 2832. In the context of single-member districting, these three Justices expressly limited their approval of race-based line drawing to those circumstances where the state employed "sound districting principles such as compactness" and where members of the racial minority are "sufficiently numerous and whose residential patterns afford the opportunity of creating districts in which they will be in the majority." *Id.* at 168. Thus, even before the analytically distinct claim in *Shaw* was recognized, the members of the Court were mindful of the abuses that lie ahead if a state's ability to "remediate" were left unbounded. See also, *UJO, supra*, at 171 (Brennan, J., concurring in part). They probably did not foresee the extremes technology would one day make possible.

at 2666 (Kennedy, J., concurring). "If efforts to *require* proportional representation of minorities in democratic institutions are not stopped with clarity and force, they will divide this country into patchwork of racial provinces, and ensure that elected officials represent races before they represent citizens." J.S. App. 71, citing *Holder v. Hall*, 114 S.Ct. 2598-99 (1994). This cannot become the law.

CONCLUSION

The racial gerrymander that is the soul of the Eleventh District cannot be squared with the Fourteenth Amendment of the United States Constitution. For that reason, the judgment below should be affirmed.

Respectfully submitted,

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